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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/771,791	01/29/2001	Scott Douglas Augustine	AUGA 17000025 C/M # 10380	8498
7590 01/29/2004			EXAMINER GIBSON, ROY DEAN	
TERRENCE A. MEADOR INCAPLAW 1050 ROSECRANS STREET, STE K SAN DIEGO, CA 92106			ART UNIT 3739 PAPER NUMBER	
DATE MAILED: 01/29/2004				

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GROUP 3700

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 18

Application Number: 09/771,791
Filing Date: January 29, 2001
Appellant(s): AUGUSTINE, SCOTT DOUGLAS

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12 Nov. 2003

(2) *Related Appeals and Interferences*

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The brief contains a statement that there are no related appeals and interferences.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

The rejection of claims that stand or fall together is as stated in the brief.

1.192(c)(7).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,620,482	Augustine et al.	4-1997
5,405,370	Irani	4-1995
3,750,664	Collins	8-1973

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(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 58, 59, 61, 63, 69 and 70 are rejected under 35 U.S.C. 102; Claims 60, 62, 64-67, 68, 75-86, 88 and 93-95 are rejected under 35 U.S.C. 103. This rejection is set forth in prior Office Action, Paper No. 14.

(11) *Response to Argument*

The applicant argues that the foot drape of Augustine et al.(USPN 5620482) is not referred to as a surgical drape and should not be considered one. However, the drape of the present invention and the drape of Augustine et al are formed of the same materials, i.e. heat sealable plastic, and can perform the same functions. Both drapes help retain heat and both can be used as a sterile covering to prevent the transportation of microorganisms. Thus the foot drape of Augustine et al can be clearly classified as a surgical drape. Extrinsic evidence of this is found in the definition for surgical drape as provided by applicant himself in the article from the Mahidal University SPECTRUM. The article states that a surgical drape is a "sterile covering...used to form an aseptic field to prevent transportation of microorganisms." The foot drape of Augustine et al is a sterile covering that will prevent transport of microorganisms.


Applicant further argues that Augustine et al does not have a provision of access to a surgical site through the drape. Note, however, that independent claim 58 fails to recite any opening in the drape. This limitation is not recited until dependent claim 60. It is the examiner's position that a surgical drape does not inherently require an opening to access a surgical site. Often numerous drapes are used where one edge of each

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drape surrounds the surgical site and therefore no single drape has an opening. It has been held within the doctrine of claim differentiation that when a claim does not contain a certain limitation and another claim does, that limitation cannot be read into a former claim in determining either validity or infringement. *Ecolab Inc. v. Paraclipse, Inc.* 285 F.3d 1362, 1375 (Fed. Cir. 2002).

For the reasons stated, it is believed that the rejections should be sustained.

Respectfully submitted,


Roy D. Gibson
Primary Examiner
Art Unit 3739

January 27, 2004

Conferees

Linda Dvorak, SPE, A.U. 3739 
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